No. 91-1526

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

Ferris J. Alexander, Sr.
Petitioner,

v.

United States Of America
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF MORALITY IN MEDIA, INC. AS AMICUS CURIAE IN SUPPORT OF THE UNITED STATES

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INTEREST OF AMICUS

Morality in Media, Inc., as Amicus Curiae, files this brief in support of the United States in this case, which is before this honorable Court on the merits under the provisions of Rule 42(2). The written consents of the petitioner and respondent have been requested and all parties have consented thereto in writing. Copies of these consents are being filed with this Court concurrently with this brief.

Morality In Media is a New York not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combatting the distribution of obscene material in the United States. This organization, now national in scope, has affiliates and chapters in various states of the Union. Its Board of

Directors and National Board are composed of prominent businessmen, clergy and civic leaders. Its national headquarters is located at 475 Riverside Drive, New York, New York 10115.

The Founder and President of Morality In Media (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He, along with Doctor Winfrey C. Link, produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography." The "Hill-Link Minority Report" was cited by this honorable Court in Kaplan v. California, 413 U.S. 115, 120 note 4 (1973) and in Paris Adult Theatre I v. Slaton, 413 U.S. 49 at 58, notes 7 and 8 (1973).

More recently Morality In Media has participated as Amicus in Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978); New York v. Ferber, 458 U.S. 747 (1982); Brockett v. Spokane Arcades, Inc., 105 S.Ct. 2794 (1985); Fort Wayne Books, Inc. v. State of Indiana, 489 U.S. 46 (1989) and Action for Children's Television v. FCC, No. 91-883, review denied, 60 L.W. 3599 (1992).

Morality In Media has a special interest in this particular case because it was the organization which suggested obscenity as a predicate act under the RICO statute and also suggested appropriate legislative language to accomplish that amendment.

Morality In Media is filing a brief in this matter in support of the United States because it believes that the

decision in this case will have a direct and lasting effect on the ability of the federal government to effectively wipe out the evil of obscenity.

It is the belief of Morality In Media that its brief contains relevant matter that may not be brought to the attention of the Court by the parties.

SUMMARY OF ARGUMENT

Morality In Media contends that the mere fact that the "enterprise" involves a so-called "First Amendment Business," which can under RICO be forfeited or dissolved after trial, should not invalidate or restrict the scope of RICO's post-trial forfeiture penalty when "Obscenity" is a predicate offense.

If post-conviction forfeiture is not permitted or is to be greatly restricted in a RICO-obscenity case, then a

criminal's so-called "First Amendment" business and corporation should also be insulated in whole or part from RICO's post-conviction forfeiture penalty no matter what the predicate crime.[1]

Morality In Media, Inc. reminds this honorable Court that a sole proprietor of a "First Amendment" business can be incarcerated for long periods of time under existing federal and state obscenity laws, effectively precluding him or her from engaging in that First Amendment business.[2] Amicus further points out that

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[1] This honorable Court, did, it is noted, deny, certiorari at 459 U.S. 825 (1982) to United States v. Thevis, 474 F.Supp. 134 (N.D. Ga. 1979), aff'd, 665 F.2d 616 (11th Cir. 1982) where the "enterprise" had as its purpose a "pornography business."

[2] Cf. Arcara v. Cloud Books, Inc., 106 S.Ct. 3172, 3177 (1986) where this Court said "A thief who is sent to prison might complain that his First Amendment right to speak in public places has been infringed."

the RICO laws are on the books not as a restraint on future First Amendment activity, but as a form of punishment for engaging in a past "pattern" of racketeering activity.[3] Near v. Minnesota is therefore not violated. Amicus further demonstrates that analogous decisions of this Honorable Court may be viewed as precedents for upholding post-conviction forfeiture in RICO-obscenity cases. Finally, Amicus demonstrates that post-conviction RICO forfeiture does not violate the Eighth Amendment.

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[3] Cf., State ex rel Kidwell v. U.S. Marketing, Inc., 631 P.2d 622, at 628, (Idaho Sup. Ct. 1981), appeal dismissed pursuant to Rule 53, 455 U.S. 1009 (1982).

ARGUMENT

I

THE RICO LAW DOES NOT AMOUNT TO A PRIOR RESTRAINT OF PROTECTED EXPRESSION, IS NOT OVERBROAD AND IS NOT VIOLATIVE OF THE FIRST AMENDMENT.

The issue of the legality of a "prior restraint" reached this honorable Court in the landmark case of Near v. Minnesota, 283 U.S. 697, 707-708 (1931). On that issue, that Court said:

"It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment.... In maintaining this guaranty, the authority of the State to enact laws to promote the health, safety, morals and general welfare of its people is necessarily admitted. The limits of

the sovereign power must always be determined with appropriate regard to the particular subject of its exercise.... Liberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse."

The Near Court continues at 283 U.S. 713:

"In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was

thus described by Blackstone:

> 'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publication [Emphasis Is The Court's] and not in freedom from censure for criminal matter when published. [Emphasis Supplied] Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.'"

The Near Court, continuing at 283

U.S. 714, 715, quotes Patterson v. Colorado:[4]

> "'The main purpose of such constitutional provisions is "to prevent all such previous restraints upon publications" as have been practiced by other governments" [Emphasis in Original] and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.'" [Emphasis Supplied]

The Near Court continues at 283 U.S. 716;

> "The protection even as to previous restraint is not absolutely unlimited.... [T]he primary requirements of decency may be enforced against obscene

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[4] 205 U.S. 454, at 462 (1907).

publications." [Emphasis Supplied]

It is interesting to note that in a dissenting opinion, Justice Butler, with whom Justices Van Devanter, McReynolds and Sutherland concurred[5], states that the majority opinion:

> "Seems to concede that under clause (a) of the Minnesota law the business of regularly publishing and circulating an obscene periodical may be enjoined as a nuisance." [Emphasis Supplied]

If Near means that such a business may be enjoined, a fortiorari, a Defendant convicted of racketeering with obscenity as the predicate crime, may, under Near be punished after the fact by a forfeiture of assets. Near is of no benefit to the petitioner.

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[5] 283 U.S. at 737.

Clearly, RICO forfeiture is not designed as a prior restraint, but is designed as punishment for past offenses. Contrary to the censorship decried in Near v. Minnesota, there is no administrative or legislative[6] prior restraint upon any particular publication; nor is there any particular subsequent restraint of any particular publication. The statute, as distinguished from the Near case situation, is "content neutral," relating to the predicate crimes which may trigger its remedies. It is not a statute that refers to the suppression of a newspaper or periodical, but "punishment in the ordinary sense" (cf., Near at 711 and 715).

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[6] The dissenting Justices in Near argued that the doctrine of prior restraint, as it came to us from England and in the Blackstone quotation, supra, was restricted to Administrative prior restraint (283 U.S. 733).

It is also significant to note that the Near v. Minnesota majority opinion, as interpreted by the dissenting justices, apparently excepted enjoining a nuisance from the concept of prior restraint-- "The business of regularly publishing and circulating an obscene periodical may be enjoined as a nuisance."[7] Near also puts on a par "enforcing concepts of decency against obscene publications" with the right of the government "to prevent actual obstruction of its recruiting service or the publication of the sailing dates of transports or the number and location of troops,"[8] indicating the seriousness of this crime and, if anything, allowing expanded, not restricted remedies.[Emphasis Supplied]

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[7] Note 5, supra

[8] 283 U.S. 716

If we examine the intent and focus of Post-Conviction RICO forfeiture in Obscenity and other cases, it is obvious that the intention of the statute is to punish by seizure of assets, not to suppress publication by a form of invidious prior restraint now or in the future. Does the fact that the assets seized may be communicative per se change the picture? The answer would have to No! Otherwise every time a creditor of a first amendment businesses, such as the IRS, seizes the inventory or fixtures or real estate of such a business it could be met with the objection that this amounts to a "prior restraint" by the government of future publications or distribution.

Obviously, the issue is not whether the assets to be seized are "expressive" but rather "for what reason" were the

assets forfeited. If the reason is to suppress freedom of speech or the press, the forfeiture is invalid. If it is to punish a criminal for violating a valid law, it is simply a form of punishment. It is clear that in Near v. Minnesota the object (purpose) of the statute was "not punishment in the ordinary sense, but suppression of the offending newspaper or periodical." The legislative history of RICO, however, "clearly demonstrates that...[it] was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." Russello v. United States, 464 U.S. 16, 26 (1983). "The major purpose of Title IX...was to address the infiltration of legitimate business by organized crime," United States v. Turkette, 452 U.S. 576, 591 (1981).

II

WHERE SUFFICIENT REASON EXISTS THE CLOSURE OF A FIRST AMENDMENT BUSINESS HAS BEEN AUTHORIZED BY THIS HONORABLE COURT AND OTHER COURTS.

There is no legal principle established in law that prevents the closing of a so-called "First Amendment" business. The law does not surround such a business with an impregnable shield. The First Amendment is not violated by a carefully tailored law designed to punish persons who abuse liberty. As was said in Near v. Minnesota:

> "In maintaining this guaranty, the authority of the State to enact laws to promote the health, safety, morals and general welfare is necessarily admitted." (283 U.S. 707) "It is recognized that punishment for the abuse of the liberty afforded to the press is

essential to the protection of the public" (283 U.S. 715). [Emphasis Supplied]

In Arcara v. Cloud Books, Inc., 106 S.Ct. 3172, 3177 (1986), this honorable Court stated:

"We must reject the Court of Appeals' reasoning, analogizing the closure order sought in this case to an unconstitutional prior restraint under Near v. Minnesota.... The closure order sought in this case differs from a prior restraint in two significant respects. First, the order would impose no restraint at all on the dissemination of particular materials, since respondent is free to carry on his bookselling business at another location even if such locations are

difficult to find.[9] Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular material is prohibited --indeed the imposition of the closure order has nothing to do with any expressive conduct at all."

There are similarities between Arcara and the case at bar. The defendant is free to carry on his "adult" book store and related activities at other locations, especially if "new" money were utilized and if the new locations avoided violating the law and in particular the Obscenity Law. The case also falls squarely into

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[9] The implication for this honorable Court here is that the First Amendment is not offended even if it takes a while to find a new location. This action was taken over the objection of the dissenting judges to the effect that "The Court improperly attempts to shift to the bookseller the responsibility of finding an alternative site" (106 S.Ct. 3180).

the second Arcara test (which by itself is sufficient to rebut a claim of prior restraint) in that the forfeiture and the RICO statute are "content neutral" and the determination for forfeiture was not imposed "on the basis of an advance determination that the distribution of particular materials is prohibited."

We also draw the attention of the Court to Avenue Book Store v. City of Tallmadge[10] where this honorable Court denied certiorari to the Ohio Court of Appeals over the stated objections of dissenting Justices. In that case, the Ohio Court of Appeals stated that:

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[10] 459 U.S. 997 (1982). In Avenue Book the Ohio Court held that the injunction did not "carry with it any of the dangers of a censorship system." It said it did not constitute a prior restraint because "no punishment will be imposed until it is proven that obscene material was indeed involved." (459 U.S. at 997). (See also cases on both sides involving padlocking outlined in the Dissent in that case at 998-999).

> "Defendant is enjoined from utilizing the rear section of the store for the exhibition, display or sale of materials which display or depict sexual conduct (activity) that is obscene."

Other cases involving First Amendment businesses, where the state action was upheld, include Art Theatre Guild, Inc. v. Ewing, 421 U.S. 923, 44 L.Ed.2d 82 (1975), dismissing an appeal from the Ohio Supreme Court, which held that a one year theatre closure provision was valid. The United States Supreme Court dismissed the appeal "For want of a substantial federal question."[11]

Young v. American Mini Theatres,[12]

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[11] Under Hicks v. Miranda, 422 U.S. 332 (1975) such a dismissal is a ruling "On the Merits."

[12] 427 U.S. 50, 62 (1976).

held that zoning laws on adult entertainment businesses do not constitute impermissible prior restraints, noting that there is "No claim that...the viewing public is unable to satisfy its appetite for sexually explicit fare. [T]he market for this commodity is essentially unrestrained."

There are lower court cases that recognize that "padlocking" of a motion picture theater is not an invidious prior restraint. A leading case is State ex rel Kidwell v. U.S. Marketing, Inc., 631 P.2d 622 (Idaho Supreme Court 1981), appeal dismissed under Rule 53, 455 U.S. 1009 (1982). The opinion of the Idaho Supreme Court in that case, in which a one year padlock was imposed, is especially enlightening and applicable. The Idaho Supreme Court there said at 631 P.2d 626:

> "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. ...What is needed is a pragmatic assessment of its operation in particular circumstances.... Kingsley Books v. Brown, 354 U.S. at 441-42."

Continuing at 627:

> "By way of example, if a bookseller, having fallen behind on his property taxes, loses his bookstore at a tax sale, he will not be heard to complain that the state has imposed an unlawful prior restraint on his bookselling activities. If that same bookseller is convicted of a crime of distributing obscene

materials, he may be imprisoned, and yet he will not be heard to complain that his incarceration constitutes a prior restraint upon his ability to disseminate protected speech, even though it is quite clear that it will have that effect."[13] [Emphasis Supplied]

The Idaho Supreme Court continued at 627:

> "There are a number of distinctions between the Near case and the previously cited hypothetical examples, not the

[13] The point here is that while in "operation and effect" the incarceration deprives the defendant of the ability to conduct a First Amendment business, it is, in "operation and effect" not a restraint of First Amendment activities. It is a restraint on the defendant's participation therein.

> least of which is the fact that Near dealt with speech critical of public officials rather than speech of a sexual nature. Most significantly, however, the Near injunction against prospective publication was based on the content of such publication. [Emphasis Supplied] In the case of tax sales and imprisonment for violation of criminal obscenity statutes, the incidental restraint on future expression is not based on the content of that expression." [Emphasis Supplied]

At page 627, footnote 8, the Idaho Supreme Court (citing cases) states:

> "The typical prior restraint case deals with the

government's effort to censor future expression based on its content."

It then, at page 628, goes on to say:

"The one-year forfeiture provision of the Idaho moral nuisance statue avoids the particular noxious specter of content control. Like a tax sale, the forfeiture is directed strictly against property, apart from the content of any expression contained therein. And like imprisonment for a criminal obscenity transgression, the forfeiture is intended to penalize past distributions of illegal and unprotected obscenity. The legislature could just as easily

have imposed a fine or other property-related penalty. Instead the legislature chose to punish the violator by temporarily depriving him of the property which was used in committing the violation."[14]

The Idaho Supreme Court, at page 68, then gives us the rationale for forfeiture statutes as follows:

"The purpose of statutory forfeitures is obvious: to punish and to deter. [F]orfeitures punish 'by

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[14] "The state's authority to impose property related sanctions in civil actions is well-established...the most prevalent example of this type of in rem activity can be found in statutes imposing forfeitures upon vehicles and vessels used to transport contraband drugs....Forfeiture is not limited to property used in drug crimes, however,...federal and state statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise" (631 P.2d. 628). [Emphasis Supplied]

imposing an economic penalty thereby rendering illegal behavior unprofitable'.... This is the manifest purpose of Idaho's one year closing provision; not to prevent future expression, but to punish past illegal conduct by depriving the violator of economic gain. That is a permissible state objective, implemented by permissible means."

At page 629 the Idaho Supreme Court says:

"Our conclusion is based on the following: the extensive powers of the state to impose a forfeiture on neutral and innocent property used in the commission of forbidden acts;

the power of the state to impose sanctions of its choice upon those who disseminate unprotected obscenity; the fact that the forfeiture or closure order is not directed at speech or publication, but is instead aimed at the real property apart from the content of expression contained therein; and the fact that the defendants remain free to disseminate any materials except those already determined to be obscene, at any other location, subject, of course, to further penal actions by the state should the defendants again violate laws regulating obscenity."

This plain and well-spoken rationale

can be lifted wholesale and applied to this case.

III

THE PROCEDURAL SAFEGUARDS OF FREEDMAN, OF HELLER, OF VANCE, OF MARCUS AND OF BOOKS DO NOT APPLY

As has been demonstrated, since there is no "prior restraint" of existing or future publications, then Freedman, Heller, Vance, Marcus, and Books do not apply.[15]

There is no effort to censor existing or future expression based on its content.[16] As this honorable Court said "Every civil and criminal remedy imposes some conceivable burden on First Amendment

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[15] Freedman v. Maryland, 380 U.S. 51 (1965); Heller v. New York, 413 U.S. 483 (1973); Vance v. Universal Amusement, Co., 445 U.S. 308 (1980); Marcus v. Search Warrant, 367 U.S. 717 (1961); A Quantity of Books v. Kansas, 378 U.S. 205 (1968).

[16] Cf., Vance v. Universal Amusement Co., 445 U.S. 308 (1980).

protected activities"[17] and "Bookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal use of premises.[18] If we substitute the words "an enterprise" for "premises" in the above quotation we have, in essence, set forth the governmental justification for application of RICO statutes in obscenity cases.

It should be observed that the mere fact that the enterprise has as its purpose a "pornography business" (where individual publications are presumed initially to be protected expression) does

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[17] Arcara v. Cloud Books, Inc., 106 S.Ct. 3172, 3177.

[18] Id. at 3178.

not mean that a RICO statute cannot be applied if that business were advanced "by means of a pattern of racketeering activity in which the defendants participated." Cf. United States v. Thevis, 474 Fed. Supp. 134 at 140 (N.D. Ga. 1979), 665 F.2d 616, at 621, cert. denied, 459 U.S. 825 (1982). In particular, "The indictment specified that the corporations were to manufacture 'peep show' machines, to sell sexually explicit literature and to distribute 'adult oriented film.'" United States v. Thevis, 474 F.Supp. 117, at 126 (N.D.Ga. 1979).

Finally, the significance of the Arcara case, as it applies to the rules of Vance, Marcus, Books, and Freedman, can be gleaned from the vigorous dissent in Arcara, when Justices Blackman, Brennan and Marshall complain that:

"Until today, the Court has required States to confine any book banning to materials that are determined through constitutionally approved procedures, to be obscene. See Marcus...Freedman.... Until today, States could enjoin the future dissemination of adult fare as a nuisance only by 'adhering to more narrowly drawn procedures than is necessary for the abatement of ordinary nuisance' See Vance...." (106 S.Ct. 3180).

Amicus quotes the dissent (without agreeing with its sentiments or conclusions) only to further indicate the inapplicability of Vance, Marcus, and Freedman to the case at bar.

IV

THE EIGHTH AMENDMENT IS NOT VIOLATED

It must be remembered that the law does not punish the defendant for obscenity violations per se. RICO added a new dimension to criminal jurisprudence, to wit a concern with "Enterprise Criminality." While the Petitioner makes much of the fact that the punishment, in his opinion, is for distributing seven magazines and videos deemed obscene, such analysis ignores the fact that under RICO the Petitioner is not being punished for the obscenity violations but for "Enterprise Criminality"-- an entirely new concept in criminal law. If he wishes to make an attack under the Eighth Amendment, he should be aiming his weapons at the question of whether the punishments of RICO "Enterprise Criminality" violate the

Constitution. "Enterprise Criminality" should not be read as synonymous with "Organized Crime." The term speaks of the commission of a crime in the context of an organization. Cf. Function of the RICO Concept, Notre Dame Law Review, Vol. 64 page 649 note 12 et seq. (1989). "The entire statutory scheme is based on the 'enterprise' concept, and it is that concept which distinguishes RICO prosecution from any other prosecution." United States v. McManigal, 708 F.2d 276, 285 (7th Cir. 1983), vacated (other grounds), 464 U.S. 979, on remand, 723 F.2d 580 (7th Cir. 1983). "The enterprise is more than an essential element of a RICO charge or claim for relief. The enterprise element is responsible, wholly or in part, for RICO's breadth, for its procedural agility, for its potent

remedies." Function of RICO Concept, supra at page 721.

Amicus' purpose in this portion of the brief is to show first, that obscenity is a serious crime; second, that the Petitioner's punishment is to be based on "enterprise criminality" and not merely on violations of the obscenity law; third, that Congress intended severity in punishment for RICO violations; and fourth, that the cases cited by the Eighth Circuit below are adequate to sustain the sentence.

The suggestion of the Ninth Circuit in United States v. Busher, 817 F.2d 1409 (9th Cir. 1987) that a proportionality review is in order in all RICO cases should be rejected by this honorable Court in favor of the Fourth Circuit approach in Pyrba, 900 F.2d at 753, 756-57, to the

effect that such a review is not in order in that the defendant did not receive a sentence of sufficient severity. The same is true here.

"Enterprise Criminality" is the basis for the sentence, not obscenity. We must remember that "The major purpose of Title IX...was to address the infiltration of legitimate business by organized crime." United States v. Turkette, 452 U.S. 576, 591 (1981). As previously mentioned RICO "was intended to provide new weapons of unprecedented scope." (Russello, supra 464 U.S. 16, 26 (1983). Under such a rationale for the existence of RICO, the punishment here is not severe enough to trigger a proportionality review. Even, if such a proportionality review were conducted, it is probable the District Court and the Eighth Circuit would have

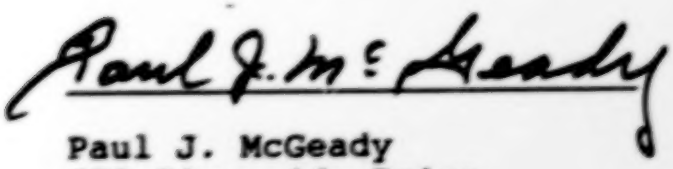
reached the same result. This is not to say that the proportionality review would not be justified under some circumstances. There is a world of difference between the New York Times and the activities of the Petitioner.

CONCLUSION

For all of the above, the decision of the Eighth Circuit should be affirmed.

DATED: September 26, 1992.

Respectfully submitted,



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